Filed 7/10/20 P. v. Gillig CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TRAVIS ANTHONY GILLIG, Defendant and Appellant.	B295041 (Los Angeles County Super. Ct. No. KA118675)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joan M. Chrostek, Judge. Affirmed.

Stanley Dale Radtke, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Steven D. Matthews and Heidi Salerno, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Travis Anthony Gillig of first degree burglary, stalking, making criminal threats, and simple assault. Gillig contends his convictions should be conditionally reversed and the matter remanded for a mental health diversion hearing pursuant to Penal Code section 1001.36;[1] defense counsel provided ineffective assistance by failing to present evidence at trial regarding his mental health; the evidence was insufficient to prove burglary; the trial court violated his constitutional rights by failing to obtain a waiver of his right to testify; and the cumulative effect of the purported errors was prejudicial. Discerning no error, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

In 2018, Glen Haas was employed as a civil collection officer for the IRS. He lived with his wife, Jamee Haas, and his daughter Kasey Haas.[2] Appellant Gillig is Jamee's nephew. Gillig believed that the federal government was conspiring against him, and Glen was heading the operation. Between April and July 2018, Gillig repeatedly threatened and harassed Glen.

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[1] All further undesignated statutory references are to the Penal Code.

[2] For ease of reference, and with no disrespect, we hereinafter refer to members of the Haas family by their first names.

a. *February 2018 exchange*

In February 2018, Glen and Gillig were at the home of Jamee's mother (Gillig's grandmother). Gillig was agitated, aggressive, and angry, and stated Glen had "jumped into his head somehow" and "was talking to him." Glen calmed Gillig down and convinced him nothing untoward was going on. However, the exchange scared Glen.

b. *April 5, 2018 incident*

On April 5, 2018, Gillig arrived at Glen's home, uninvited. Glen was not home at the time. When Glen arrived later, he was told Gillig had been very agitated and had either urinated on or thrown water on his bed. Fearful Gillig would return, Glen stayed the night at a hotel. At 3:45 a.m., Gillig called Glen, asking why Glen was "messing" with Gillig's bank account and accusing him of "doing an investigation" of him. Glen truthfully denied Gillig's allegations. Gillig stated, "I know you have a gun and I've got a gun too." Glen replied that he did not have a gun and was not armed as a part of his job. Glen told Gillig to leave him alone and never come to his house again. He also called him a "fucking psychopath."

c. *July 4 incident*

On July 4, 2018, Jamee and Glen were out of town. Gillig arrived at their home and called Jamee to tell her he was there. Jamee told him he was not supposed to be there, and called the police. Gillig was in the backyard when an officer arrived. When the officer asked why he was there, Gillig said he wished to speak to Glen and Jamee about his accounts being hacked.

On July 11, 2018, a court issued a temporary restraining order requiring that Gillig stay away from Glen, Jamee, and

Kasey, and stay at least 100 yards away from their home. It was due to expire on July 31, 2018.

d. *July 22 incident*

On the evening of July 22, 2018, Glen was at home, lying down in a spare bedroom, recovering from knee replacement surgery. Kasey was in her bedroom. Jamee was loading items into her car, and left the side door of the residence open as she did so. Suddenly, Gillig entered through the side door, holding a can of beer. Neither Jamee nor Glen had given him permission to enter. Gillig said, "Where is Glen? Where is Glen? I'm going to kill him." To warn Glen, Jamee yelled, "Travis is here." Jamee tried to call police, but was so nervous she was unable to dial. She ran next door, told her neighbor that Gillig was threatening to kill Glen, and asked him to call 911.

Gillig "bust[ed] through" the spare bedroom door, screaming that he needed to talk to Glen. Glen attempted to get up, but Gillig pushed him back on the bed, jumped on top of him, and punched him in the face with a closed fist at least five times, causing a laceration behind Glen's ear, among other injuries. He jammed his knee into Glen's shoulder, causing a "frozen shoulder."

Kasey heard screaming and punching, and entered the spare room to find Gillig on top of her father, punching him. She pulled Gillig off. Glen fled down the hall and locked himself in a bathroom. Gillig followed. He yelled at Glen, "I'm going to fuck you up, motherfucker." Gillig referenced a bank account and stated, "I know you are f–ing with my accounts." Kasey ran to her bedroom, grabbed her car keys and cellular telephone, and fled out her bedroom window.

Jamee reentered the house, afraid for Glen's and Kasey's safety. While she spoke to and distracted Gillig, Glen fled from the bathroom to the driveway. Kasey gave Glen her car keys and told him to drive away. He drove off briefly, but returned and waited in front of his house. Inside the house, Gillig demanded money from Jamee. She backed toward the door and fled. Gillig exited the house and approached Glen in the car. He stated that Glen was "a pussy," repeatedly threatened that he had a knife and would kill Glen,[3] mentioned "the government," and said that Glen had been "talking to me every single day in my head." Gillig threatened, "I'm going to get him. I'm going to kill him. He can't get away"; "This is not over"; and he "would be back every single day."

Gillig asked if Jamee had called the police, and left when sirens could be heard in the distance. Glen and Jamee followed him in the car. Police arrived and apprehended Gillig.

The defense presented no evidence.

2. *Procedure*

A jury convicted Gillig of first degree burglary while a person was present (§ 459), stalking (§ 646.9, subd. (a)), making criminal threats (§ 422, subd. (a)), and simple assault (§ 240), a lesser included offense of assault by means of force likely to produce great bodily injury. The trial court sentenced Gillig to five years in prison. It imposed various fines, fees, and penalty assessments, including a restitution fine, a suspended parole revocation restitution fine, a court operations assessment, and a criminal conviction assessment. Gillig timely appealed.

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[3] There was no evidence presented that Gillig actually possessed a knife during the incident.

DISCUSSION

1. *Issues related to Gillig's mental health*

a. *Additional facts*

On August 10, 2018, before the preliminary hearing, defense counsel declared a doubt about Gillig's competence to stand trial. Gillig was thereafter evaluated in Department 95, the mental health department of the Los Angeles Superior Court, and found competent.

On August 27, 2018, Gillig made a *Marsden* motion.[4] During the hearing the court stated, "I'm considering declaring a doubt." Defense counsel informed the court that she had attempted to have Gillig evaluated for mental health treatment or services but he refused to speak to the evaluator. The court expressed concern that Gillig did not "know what's going on." Gillig requested that the charges be read to him, questioned whether he had "proper documentation," and requested "paperwork" advising him of the date of his next court appearance.

At the preliminary hearing, Jamee testified that when she asked Gillig why he wanted to talk to Glen, he replied that "the voices are telling him that Glen is a conspiracy in his life." Jamee also testified that she was aware, via her mother and grandmother, of Gillig's "mental condition." Glen testified at the preliminary hearing that Gillig's beliefs about him leading a conspiracy, placing a tracking device on Gillig's car, or preventing Gillig from opening a checking account, were delusional.

On December 3, 2018, the case was sent to a courtroom for trial. When the court advised Gillig of the maximum potential

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[4] *People v. Marsden* (1970) 2 Cal.3d 118.

sentence, Gillig asked to be informed of the charges against him and requested that the court define burglary. After the court responded to his requests, Gillig stated, "[C]an I get documentation of all of this? It's been four months. I've gotten no documentation and I want as much documentation as possible. The original four months, all my court dates, I would like minute orders of my court dates."

On December 5, 2018, at the start of trial, Gillig asked the court for "paperwork on the day's testimony," and complained that he was unaware of what was going on. The court advised Gillig to discuss these issues with defense counsel. After the jurors entered the courtroom, the court explained that the People would not be proceeding on one of the original charges. Gillig interjected: "Judge, I need someone to interpret what's going on. And I don't know why he is—" The court excused the jurors and told Gillig outbursts would not be tolerated. Gillig complained that defense counsel was "trying to antagonize" him. Defense counsel stated that he had been attempting to explain to Gillig that one of the counts had been dismissed, but Gillig was unsatisfied with his explanation. The following transpired:

"[Gillig]: This person is trying to antagonize me. How can I communicate with my attorney? Am I supposed to even be here? Is it necessary that I'm even in this court? You guys already have it figured out anyway. . . . [C]ould you have someone who looks like me come in for the camera or whatever you have going on?"

"[The Court]: Take him away. [¶] Mr. Sario [defense counsel], the court is having some issues with whether or not Mr. Gillig is competent to stand trial. His behavior does seem very out of control. He is very obstreperous. He doesn't seem to

understand what is going on in these proceedings. But jeopardy has attached and we have started trial.

"[Defense counsel]: Your Honor, . . . a doubt was previously declared as to Mr. Gillig in August 2018 and he was evaluated and determined to be competent. I don't know if it was based on similar behavior or not. But in terms of competency—

"[The Court]: He seems very focused on having paper and that does not seem to be the important part of this trial to the court. . . . [H]is whole focus seems to be on paper, when he is looking at serious charges and many strikes. [¶] Does he understand what is happening in these proceedings?

"[Defense counsel]: I believe he does."

When Gillig returned to the courtroom, the court advised that further outbursts would not be tolerated. Gillig replied, "I don't care about this any more. You guys—this isn't a real case."

At trial, Glen testified, on cross-examination, that he was aware, through relatives, that Gillig had "mental health issues." He clarified, "I'm not sure if it's mental health issues or drug issues. . . . But I know he's had problems with drugs and thinking for years, more than two or three." Defense counsel asked whether Glen had included "information about [Gillig's] schizophrenia" in his application for a temporary restraining order. Glen replied: "Yes. And qualified that, I think, with I'm not a physician. I don't remember if I qualified it completely." The court subsequently ordered all testimony "regarding any mental health or anything regarding drug use" stricken, because there was no foundation for it, given that Glen was neither a doctor nor an expert. The court queried whether the defense intended to call a mental health expert. Defense counsel said he

did not, and explained he had elicited Glen's testimony for impeachment purposes.

Gillig did not request pretrial mental health diversion at any point.

b. *Pretrial diversion under section 1001.36*

Gillig argues his convictions should be conditionally reversed and the matter remanded so the trial court can consider granting him pretrial mental health diversion pursuant to section 1001.36. We disagree.

(i) *Section 1001.36*

Effective June 27, 2018, the Legislature added sections 1001.35 and 1001.36 to the Penal Code, which authorize trial courts to grant pretrial diversion to defendants diagnosed with qualifying mental disorders. (*People v. Frahs* (June 18, 2020, S252220) __ Cal.5th __ [2020 Cal.Lexis 3736, *5–*6] (*Frahs*)[5]; § 1011.36, subd. (b).) "Pretrial diversion" means " 'the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment . . . .' " (*Frahs*, at p. __ [2020 Cal.Lexis at p. *6]; § 1001.36, subd. (c).) The purposes of the law include promoting increased diversion of persons with mental disorders to mitigate their entry and reentry into the criminal justice system, meeting their mental health treatment and

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[5] Effective January 1, 2019, the Legislature amended section 1001.36 to specify that defendants charged with certain crimes, such as murder and rape, are ineligible for diversion. (*Frahs*, *supra*, __ Cal.5th at pp. __ [2020 Cal.Lexis at pp. *7–*8]; Stats. 2018, ch. 1005, § 1.)

support needs, and protecting public safety. (§ 1001.35; *Frahs*, at pp. __ [2020 Cal.Lexis at pp. *6–*7].)

A trial court has discretion to grant pretrial diversion if it finds all of the following: (1) the defendant has been diagnosed with a qualifying mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder, but excluding antisocial personality disorder, borderline personality disorder, and pedophilia; (2) the disorder was a significant factor in the commission of the charged offense; (3) in the opinion of a qualified mental health expert, defendant's symptoms of the mental disorder motivating the criminal behavior would respond to mental health treatment; (4) subject to certain exceptions related to incompetence, the defendant consents to diversion and waives his or her speedy trial rights; (5) the defendant agrees to comply with treatment as a condition of diversion; and (6) the court is satisfied that the defendant will not pose an unreasonable risk of danger to public safety if treated in the community, as defined in section 1170.18. (§ 1001.36, subd. (b); *Frahs*, *supra*, __ Cal.5th at pp. __ [2020 Cal.Lexis at pp. *7–*8].)

If the defendant makes a prima facie showing that he or she meets all of the threshold eligibility requirements, and the trial court is satisfied that the recommended program of mental health treatment will meet the defendant's specialized mental health needs, then the court may grant pretrial diversion, for a period of no longer than two years. (*Frahs*, *supra*, __ Cal.5th at p. __ [2020 Cal.Lexis at p. *8]; § 1001.36, subds. (a)-(c).) If the defendant performs satisfactorily, at the end of the diversion

period the trial court shall dismiss the criminal charges. (*Frahs*, at p. __ [2020 Cal.Lexis at p. *8]; § 1001.36, subd. (e).) If the defendant is charged with an additional crime or otherwise performs unsatisfactorily, the court may reinstate criminal proceedings. (*Frahs*, at p. __ [2020 Cal.Lexis at p. *8]; § 1001.36, subd. (d).)

Recently, in *People v. Frahs*, *supra*, __ Cal.5th __, our Supreme Court resolved a split of authority in the appellate courts and held that section 1001.36 applies retroactively to cases in which the judgment is not yet final. (*Frahs*, at pp. __ & fn. 2 [2020 Cal.Lexis at pp. *3, *14–*18 & fn. 2].) Where, as in *Frahs*, the mental health diversion statute was enacted after the defendant's conviction, a conditional limited remand for a diversion eligibility hearing is warranted when the record "affirmatively discloses that the defendant appears to meet at least the first threshold eligibility requirement for mental health diversion—the defendant suffers from a qualifying mental disorder [citation]." (*Frahs*, at pp. __ [2020 Cal.Lexis at pp. *35–*36].)

(ii) *Gillig is not entitled to a conditional remand*

In his opening brief, Gillig avers that "the new law should apply retroactively to cases such as appellant's that were not final on the date of section 1001.36's enactment." He points out that defendants are entitled to sentencing decisions " ' "made in the exercise of the 'informed discretion' of the sentencing court" ' " and a " ' "court which is unaware of the scope of its discretionary powers" ' " cannot exercise such discretion. (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) Remand is necessary, he avers, because

"at the time appellant was charged and sentenced the trial court did not have discretion to grant appellant pretrial diversion."

Gillig is incorrect. As noted, section 1001.36 does apply retroactively. (*Frahs*, *supra*, __ Cal.5th at p. __ [2020 Cal.Lexis at pp.*14–*15].) But that precept does not assist Gillig, because unlike the defendant in *Frahs*—who was convicted *before* section 1001.36 took effect—here, at all relevant times, the statute was already in place. Section 1001.36 took effect on June 27, 2018. (*People v. McShane* (2019) 36 Cal.App.5th 245, 259, review granted Sep. 18, 2019, S257018 ["Penal Code section 1001.36 was enacted on June 27, 2018 . . . and took effect immediately"].) Gillig's preliminary hearing transpired on September 10, 2018; he was charged by information on September 24, 2018; trial commenced on December 3, 2018; and he was sentenced on January 8, 2019. Thus, section 1001.36 was in place months before trial. We presume that the trial court was aware of and followed the applicable law. (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1229; *People v. Reyes* (2016) 246 Cal.App.4th 62, 82.) There is no indication in the record that the court was unaware of or mistaken about the scope of its discretion under section 1001.36. (Cf. *People v. Mosley* (1997) 53 Cal.App.4th 489, 496 [remand for resentencing under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 not required when sentencing transpired 53 days after *Romero* was published].)

Further, despite Gillig's assertions that he is "a textbook candidate for a diversion hearing" and that he "satisfied the six requirements necessary to qualify for mental health diversion," the record before us is devoid of information or evidence that would have allowed the court to grant a diversion request, even if one had been made. Section 1001.36 requires that a qualified

mental health expert has diagnosed the defendant with a qualifying mental disorder. The statute states: "Evidence of the defendant's mental disorder *shall be provided by the defense and shall include a recent diagnosis by a qualified mental health expert*." (§ 1001.36, subd. (b)(1)(A), italics added.) The defense presented no such diagnosis here. The statute also requires a showing that, "In the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder motivating the criminal behavior would respond to mental health treatment." (§ 1001.36, subd. (b)(1)(C).) Again, no such expert opinion exists in the record before us. Section 1001.36 also requires that the defendant consent to diversion, waive his right to a speedy trial, and agree to comply with treatment. (§ 1001.36, subds. (b)(1)(D) & (E).) There is no showing these requirements were met, and no reason to assume Gillig would have agreed to them in light of his opposition to a continuance and his obstreperous behavior at trial.

In sum, where, as here, section 1001.36 was in place and Gillig failed to request diversion or present any of the evidence required by the statute, he cannot be heard to complain on appeal that the trial court somehow erred by failing to consider his eligibility. (See generally *People v. Scott* (1994) 9 Cal.4th 331, 353 [forfeiture doctrine applies to claims trial court failed to properly make or articulate its discretionary sentencing choices]; *People v. Carmony* (2004) 33 Cal.4th 367, 375–376 [failure to invite trial court to exercise discretion to dismiss a strike forfeits the right to raise the issue on appeal].)

Despite these omissions, Gillig contends his argument should be considered on appeal and the matter remanded for several reasons. First, he states that a trial court's "complete

failure . . . to exercise the discretion vested in it by law is subject to review absent an objection." But, as we have explained, the trial court cannot be faulted for failing to consider a request that was never made, where supporting documentation was never presented. Because Gillig did not demonstrate he met the statutory eligibility requirements, there was no basis upon which the trial court could have exercised its discretion to grant diversion.

Gillig argues that the trial court "already possessed in the court file sufficient evidence of appellant's mental health issue, paranoid schizophrenia," to find he had "the necessary mental illness." He points to the circumstances discussed *ante*, including: (1) the fact his competence was questioned; (2) his behavior and statements at trial, including his focus on written documentation; (3) Glen's statement in his request for the temporary restraining order that Gillig suffered from schizophrenia;[6] and (4) the witnesses' preliminary hearing or trial testimony that Gillig believed Glen was involved in a conspiracy against him, heard Glen's voice in his head, and had mental health issues.

But none of the foregoing circumstances was the equivalent of a mental health expert's diagnosis or opinion that the defendant's symptoms would respond to treatment. Gillig was found competent to stand trial.[7] The opinions of laypersons that

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[6] As noted, Glen's testimony about the contents of the temporary restraining order and his belief that Gillig suffered from mental health issues was stricken. For purposes of argument, however, we consider it here.

[7] That competency finding is not challenged on appeal.

Gillig suffered from schizophrenia or an unspecified "mental health issue" did not come close to meeting the statutory eligibility requirements. As the trial court stated when considering admissibility, Glen was not competent to "make any evaluation of Mr. Gillig's mental health. He is not a doctor. He's not an expert." Moreover, the circumstances Gillig points to do not compel a conclusion he had a diagnosed, qualifying mental illness. Glen was uncertain about the nature of Gillig's condition; he stated he was unsure whether Gillig suffered from mental health issues or drug issues. It appears not all of Gillig's concerns were delusional: at sentencing, Glen told the court that Gillig was, in fact, the victim of fraud in regard to his checking account. And the probation report stated there was "No indication or claim of significant physical/mental/emotional health problem." In short, while various circumstances suggested Gillig suffered from an undiagnosed mental health or substance abuse issue, they were not a substitute for the statutory requirements.

Gillig's further contentions lack merit. The question of his eligibility for diversion does not present a pure question of law arising from undisputed facts. Obviously, whether Gillig met the requirements of section 1001.36 is a disputed and entirely factual question. Gillig's discussion of the distinction between waiver (the intentional relinquishment or abandonment of a known right) and forfeiture (the failure to make a timely assertion of a right), does not assist him. (See *People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6; *In re Campbell* (2017) 11 Cal.App.5th 742, 755.) Gillig's argument has been forfeited, not waived, because he failed to timely assert it or establish his eligibility. Finally, without citation to authority or further explication, he argues

that "[f]ederal and state due process requires the trial court to determine whether Gillig was eligible for, at the very least, consideration of whether he met the criteria for mental health diversion." But Gillig fails to offer any authority or argument supporting this conclusory assertion, and we decline to consider it. (See *People v. Smith* (2003) 30 Cal.4th 581, 616, fn. 8 [we need not consider perfunctory assertion unaccompanied by supporting argument]; *People v. Stanley* (1995) 10 Cal.4th 764, 793.)

Finally, Gillig has failed to establish his trial counsel provided ineffective assistance by failing to request diversion. "In order to establish a claim for ineffective assistance of counsel, a defendant must show that his or her counsel's performance was deficient and that the defendant suffered prejudice as a result of such deficient performance. [Citation.] To demonstrate deficient performance, defendant bears the burden of showing that counsel's performance ' " ' "fell below an objective standard of reasonableness . . . under prevailing professional norms." ' " ' [Citation.]" (*People v. Mickel* (2016) 2 Cal.5th 181, 198; *Strickland v. Washington* (1984) 466 U.S. 668, 687–692; *People v. Bell* (2019) 7 Cal.5th 70, 125.) We accord great deference to counsel's tactical decisions, and presume that counsel's actions fell within the broad range of reasonableness and can be explained as a matter of sound trial strategy. (*Mickel*, at p. 198; *Bell*, at p. 125.) Therefore, a defendant faces a difficult burden on direct appeal. A reviewing court will reverse a conviction based on ineffective assistance grounds only if there is affirmative evidence that counsel had no rational tactical purpose for an action or omission, was asked for a reason and failed to provide one, or there could be no satisfactory explanation. (*Mickel*, at p. 198; *People v. Hoyt* (2020) 8 Cal.5th 892, 958; *Bell*, at p. 125.)

Gillig contends there could have been no satisfactory reason for counsel's omission. Not so. Counsel could have chosen not to request diversion for a variety of reasons. For all we know, Gillig might not have consented to diversion. He may well have refused to waive his speedy trial rights or declined to agree to comply with treatment. Counsel may have been privy to information that Gillig does not suffer from a diagnosed qualifying disorder, or that the symptoms of the disorder would not have been amenable to treatment. As our Supreme Court has observed, "certain practical constraints make it more difficult to address ineffective assistance claims on direct appeal rather than in the context of a habeas corpus proceeding. [Citations.] The record on appeal may not explain why counsel chose to act as he or she did. Under those circumstances, a reviewing court has no basis on which to determine whether counsel had a legitimate reason for making a particular decision, or whether counsel's actions or failure to take certain actions were objectively unreasonable." (*People v. Mickel*, *supra*, 2 Cal.5th at p. 198; see *People v. Snow* (2003) 30 Cal.4th 43, 94–95; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267.) Such is the case here.

c. *Failure to present testimony about Gillig's mental health*

Gillig next argues that defense counsel provided ineffective assistance by failing to "introduce the testimony of a mental health expert, psychiatric reports, or other evidence" demonstrating that his "mental illness rendered him incapable of forming the necessary specific intent."

Despite this assertion, Gillig acknowledges that the diminished capacity defense, i.e., the claim that a defendant lacked the capacity to form a particular mental state due to his or

her mental disease or disorder, was abolished in 1981. (See, e.g., *People v. Parker* (2017) 2 Cal.5th 1184, 1222, fn. 15; *People v. Wright* (2005) 35 Cal.4th 964, 978; § 28.) However, the theory of "diminished *actuality* survives, i.e., the jury may generally consider evidence of voluntary intoxication or mental condition in deciding whether defendant actually had the required mental states for the crime." (*People v. Steele* (2002) 27 Cal.4th 1230, 1253; *People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437.) Thus, " '[s]ections 28 and 29 permit introduction of evidence of mental illness when relevant to whether a defendant actually formed a mental state that is an element of a charged offense, but do not permit an expert to offer an opinion on whether a defendant had the mental capacity to form a specific mental state or whether the defendant actually harbored such a mental state.' [Citations.]" (*People v. DeHoyos* (2013) 57 Cal.4th 79, 120; *People v. Larsen* (2012) 205 Cal.App.4th 810, 826 [§§ 28 and 29 prohibit an expert from offering an opinion on the ultimate question of whether the defendant had a particular mental state].)

Gillig argues that his counsel provided ineffective assistance by failing to investigate a diminished actuality defense and present evidence supporting it. (See generally *People v. Foster* (1992) 6 Cal.App.4th 1, 11 [" 'Counsel, to be effective, must investigate all factual and legal defenses. If counsel's failure to do so causes the withdrawal of a potentially meritorious defense, a defendant has been denied effective assistance of counsel.' "]; *People v. Williams* (1988) 44 Cal.3d 883, 943.) Gillig argues that counsel's purported omissions "resulted in the presentation of an incomplete, undeveloped diminished actuality defense." He also maintains that counsel could have had no legitimate tactical reason for failing to raise a diminished actuality defense.

Gillig's ineffective assistance claim fails for several reasons. We have set forth the relevant standard for evaluating ineffective assistance claims *ante*. First, Gillig simply assumes counsel failed to investigate. However, the record contains not a shred of support for this contention, and we do not adopt Gillig's unsupported presumption.

Second, this was not a case in which defense counsel clumsily presented an inchoate diminished actuality theory. The defense did not advance this theory at all. Defense counsel sought to elicit Glen's statement that Gillig was schizophrenic in an attempt to impeach Glen's trial testimony, not to demonstrate diminished actuality.

Third, the record suggests tactical reasons why counsel might have chosen not to pursue a diminished actuality theory. Three of the four crimes with which Gillig was charged required proof of his intent. The criminal threats charge required proof that Gillig intended his statements to be understood as threats. (CALCRIM No. 1300.) The stalking charge required proof he made a threat with the intent to place his victim in reasonable fear for his safety. (CALCRIM No. 1301.) And the burglary charge required proof Gillig entered the Haas home with the intent to commit a felony, assault with force likely to produce great bodily injury. (CALCRIM No. 1700.) Counsel could reasonably have concluded that in light of the evidence, a diminished actuality theory was unlikely to succeed. Gillig repeatedly threatened to kill Glen and engaged in an unprovoked attack on him as he was lying in bed recovering from surgery. Even if the jury believed Gillig was schizophrenic, counsel would have had an uphill battle convincing it that Gillig did not *actually* intend to threaten Glen, place him in fear, or assault him, in light

of the compelling evidence of his express threats to kill Glen and his promise to return and finish the job.

Fourth, the record on appeal does not demonstrate that a mental health expert's testimony or other mental health related evidence would necessarily have aided the defense. There is no showing that an expert would have provided favorable testimony. Based on the record, we cannot determine what a mental health evaluation of Gillig might have shown, or how such an evaluation might have impacted his defense. Thus, we cannot conclude counsel's omission was objectively unreasonable. (See *People v. Mickel*, *supra*, 2 Cal.5th at p. 198; *People v. Snow*, *supra*, 30 Cal.4th at pp. 94–95.)

2. *The evidence was sufficient to prove burglary*

Gillig contends the evidence was insufficient to prove burglary. He argues that the jury must have found he lacked the requisite intent to commit a felony—assault with force likely to produce great bodily injury—when he entered the Haas residence, because it found him guilty of the lesser included offense of simple assault, a misdemeanor.

When determining whether the evidence was sufficient to sustain a criminal conviction, " ' "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.]' " (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1104; *People v. Salazar* (2016) 63 Cal.4th 214, 242.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Booker* (2011) 51 Cal.4th 141, 172; *People v. Medina* (2009) 46

Cal.4th 913, 919.) Reversal is not warranted unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Penunuri* (2018) 5 Cal.5th 126, 142.)

Burglary has two elements: (1) unlawful entry into a structure, (2) with the intent to commit a theft or any other felony. (§ 459; *People v. Anderson* (2009) 47 Cal.4th 92, 101; *People v. Montoya* (1994) 7 Cal.4th 1027, 1041.) If the house was inhabited at the time of entry, the crime is elevated to first degree burglary. (§ 460; *Anderson*, at p. 101; *People v. Garcia* (2017) 17 Cal.App.5th 211, 223.) Completion of the offense intended is not required. (*Montoya*, at pp. 1041–1042; *In re Matthew A.* (2008) 165 Cal.App.4th 537, 540.) Because intent is rarely susceptible of direct proof, it may be inferred from the facts and circumstances disclosed by the evidence. (*People v. Holt* (1997) 15 Cal.4th 619, 669; *People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1574.)

Here, the People's theory was that Gillig entered the Haas home with the intent to commit the felony of assault by means of force likely to produce great bodily injury. Accordingly, the trial court instructed that to prove the burglary, the People had to establish that Gillig entered the building with the intent to commit that offense. The instruction further stated, "The defendant does not need to have actually committed [a]ssault with force likely to produce [g]reat bodily injury as long as he entered with the intent to do so."

There was ample evidence to prove burglary, including the requisite intent. The undisputed evidence showed Gillig entered the Haas residence without permission, after having been told to

stay away, and in violation of a restraining order. Upon entry, Gillig said to Jamee, "Where is Glen? I'm going to kill him." Gillig then burst into the bedroom where Glen was recovering from knee surgery, jumped on top of him, and repeatedly punched him in the face. During the incident, he repeatedly threatened to kill Glen and "fuck [him] up." Based upon this evidence, it was an eminently reasonable conclusion that when he entered the house, Gillig intended to assault Glen by means of force likely to cause great bodily injury. We must accept logical inferences that the finder of fact might have drawn from the evidence. " ' " 'When the evidence justifies a reasonable inference of felonious intent, the verdict may not be disturbed on appeal.' " ' [Citation.]" (*People v. Holt*, *supra*, 15 Cal.4th at p. 670.)

Gillig argues that because the jury acquitted him of assault by means of force likely to produce great bodily injury—instead finding him guilty of the lesser included offense of simple assault, a misdemeanor—he must not have had the intent to commit the former offense when he entered the Haas home. The jury's contrary verdict, he complains, was based on mere conjecture and speculation.

But Gillig's argument is undermined by *People v. Montoya*, wherein our Supreme Court explained: "The crime of burglary consists of an act—unlawful entry—accompanied by the 'intent to commit grand or petit larceny or any felony.' (§ 459.) One may [be] liable for burglary upon entry with the requisite intent to commit a felony . . . regardless of whether the felony or theft committed is different from that contemplated at the time of entry, or whether any felony or theft actually is committed." (*People v. Montoya*, *supra*, 7 Cal.4th at pp. 1041—1042, fn. omitted; *People v. Allen* (1999) 21 Cal.4th 846, 863, fn. 18.)

And, the fact the jury acquitted Gillig of assault by means of force likely to produce great bodily injury does not amount to a finding he lacked the requisite intent. It has long been held that assault, including assault by means of force likely to produce great bodily injury, is a general intent crime; the intent to cause great bodily injury is not an element. (See *People v. Chance* (2008) 44 Cal.4th 1164, 1167, 1169; *People v. Windham* (1977) 19 Cal.3d 121, 130 ["It is well settled that assault by means of force likely to produce great bodily harm is a general intent crime"]; *People v. Leonard* (2014) 228 Cal.App.4th 465, 486; *People v. Miller* (2008) 164 Cal.App.4th 653, 662—663 [to prove assault, prosecution need not prove defendant specifically intended to cause injury]; *People v. Albritton* (1998) 67 Cal.App.4th 647, 658; *People v. Martinez* (1973) 31 Cal.App.3d 355, 359.) Accordingly, the jury was instructed that to find Gillig guilty of felony assault, it had to find that he willfully used force likely to produce great bodily injury; it was *not* instructed that he had to have any specific intent. The jury's acquittal thus indicates nothing about Gillig's intent. It could easily have determined that Gillig *intended* to commit felony assault, but failed to succeed in that goal.

To the extent Gillig argues there was no evidence he intended to commit more than a simple battery against Glen, this contention also fails. As noted, usually intent must be proved circumstantially. This case presents an exception to the rule, in that the People presented both direct and circumstantial evidence of Gillig's intent. Gillig repeatedly stated he intended to kill Glen. This direct evidence was confirmed by his actions: he repeatedly punched and chased Glen. This combination of threats and actions amply proved the requisite intent.

Gillig's reliance on *People v. Duke* (1985) 174 Cal.App.3d 296 (*Duke*), is unavailing. There, the defendant was convicted of attempted sexual battery, assault with force likely to produce great bodily injury, and burglary, arising from separate incidents in which he touched three victims through their clothing. The court concluded the evidence was insufficient to support the attempted sexual battery charges because there was no evidence defendant attempted to touch the victims' skin. (*Id.* at pp. 299, 301—302.) There was insufficient evidence to support the assault charge because the force used against the victim was minimal and momentary. (*Id.* at p. 303.) As to the burglary convictions, the court reasoned: "The only basis for finding a felonious intent in appellant's mind when he entered Jeri's office and Erica's residence was the specific intent to commit sexual battery. Because the evidence only supports a finding that appellant intended to commit acts amounting to simple assault against these women when he entered the buildings, the burglary convictions must be reversed." (*Ibid.*)

Duke does not support a conclusion that acquittal on the felony assault charge here compels reversal of the burglary conviction. *Duke* did not reverse the burglary convictions because the jury acquitted the defendant of felony assault. Instead, the problem in *Duke* was that there was no evidence the defendant intended to commit sexual battery. Because the burglary charges were based on Duke's intent to commit sexual battery, the evidentiary deficit was fatal to the burglary charges as well. In contrast, we have not found any insufficiency of the evidence to support the felony assault conviction, and as we have explained, the jury's acquittal of Gillig on that count does not demonstrate any. To the contrary, there was ample evidence of Gillig's intent.

As *Duke* observed, neither a weapon nor serious injury is required to prove the offense. (*Duke*, *supra*, 174 Cal.App.3d at p. 302; see *People v. Fierro* (1991) 1 Cal.4th 173, 251, & fn. 27.) Unlike in *Duke,* where the defendant only momentarily grabbed the victim and caused no physical injury, Gillig's attack *did* cause physical injuries: Glen suffered a cut behind his ear, a bloodied face, lacerations to his mouth, and a shoulder injury. And, *Duke* noted that a defendant's statements could suffice to prove intent. (*Duke*, at p. 301.) Gillig made statements clearly showing his intent here. Therefore, Gillig's emphasis on the *Duke* court's statements that we "do not consider the force that the appellant *could* have used against the victim," and "what counts is the force actually exerted," (*id.* at p. 303), is inapt.

3. *Waiver of right to testify*

Finally, Gillig argues the trial court "violated [his] constitutional right to testify as [he] did not knowingly, voluntarily and intelligently waive" that right. He is incorrect.

a. *Additional facts*

After the People rested, the court inquired whether Gillig would testify. The following colloquy then transpired:

"[The Court]: Mr. Gillig, you have the absolute right not to testify.

"[Gillig]: I want to know my rights as a person testifying. If I can know my rights as a person testifying.

"[The Court]: So you have the absolute right not to testify. You have the right to rely on that the People have not proven their case, if you so wish. However, you also have the right to testify. Most attorneys do not encourage their clients to testify. I don't know. You will be subject to cross-examination. It will not be just what you want to say. Once you are up here and you

answer the questions, the People have a right to fully cross-examine you.

"[Gillig]: Would I be able to get a sheet of paper that states the rule of that?

"[The Court]: The rules of what?

"[Gillig]: The rules of being—what is that called?

"[The Court]: These are the rules of evidence.

"[Gillig]: What is that called when I sit there?

"[The Court]: You would be testifying.

"[Gillig]: So can I get a piece of paper that states the law on someone testifying, the rights that they have.

"[The Court]: The laws are evidentiary.

"[Gillig]: Yes or no? Can I get a piece of paper from the court from the law books? I am not articulating myself that well. Am I able to get that documentation?

"[The Court]: Sir, this is the Evidence Code and this is what you would be subject to if you are cross-examined.

"[Gillig]: That whole book is my rights for being cross-examined?

"[The Court]: These are the rules of evidence and the court rules on them, rules on any objection or any statement based upon the rules of evidence.

"[Gillig]: So is it possible we go to the area where it says for testimony and I can get a copy of that?

"[The Court]: Counsel, I'm going to ask you at this time to meet with Mr. Gillig, explain to him the perils of testifying." The court then took a recess to allow counsel to confer with Gillig.

After the recess, the colloquy continued:

"[The Court]: . . . Mr. Sario, what does your client elect to do in regard to testifying?

"[Defense counsel]: I was able to speak with Mr. Gillig about his right to testify and his right not to testify. He did not give me an answer either way. But he did have further questions regarding what it would entail and I reiterated what the court was saying that it does involve quite a bit of law related to evidence. I did go over the procedure on my questioning and the D.A.'s questioning, what he would be subject to. Again, he did not give me an answer one way or the other whether he wanted to testify. It's my position that in order to preserve his rights, I think—the default is he has a right to remain silent and he should exercise it without an affirmative answer one way or another.

"[The Court]: You don't want any further inquiry from the court?

"[Defense counsel]: Perhaps briefly. But it doesn't appear—he's not answering the direct question of whether or not he wants to testify or not.

"[The Court]: All right. So, Mr. Gillig, the court cannot interfere with an attorney/client relationship. I cannot order your attorney to provide you anything because that would be interfering and inquiring into your relationship with your attorney which the court is not allowed to do.

"[Gillig]: I have something about that.

"[The Court]: Here's where we are at. It is now the defense case. So I'm inquiring of you whether or not it is your request—is it your wish to testify?

"[Gillig]: I was wondering about the relationship between me and my attorney. What is he by law required to—

"[The Court]: So this is what I'm asking you is a yes or no question. So is it your request—do you wish to rely on the state of evidence or are you going to testify?

"[Gillig]: I'm going to have to decline due to I don't know my rights.

"[The Court]: Okay. So you are going to exercise your right to remain silent.

b. *The trial court committed no error and Gillig's right to testify was not infringed*

"A defendant in a criminal case has the right to testify in his or her own behalf. [Citations.] The defendant may exercise the right to testify over the objection of, and contrary to the advice of, defense counsel. [Citations.]" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1332.) Where counsel and the defendant disagree, the defendant must timely and adequately assert his right to testify. (*People v. Hayes* (1991) 229 Cal.App.3d 1226, 1231.)

It has long been settled that, absent an express conflict between counsel and a defendant regarding the right, a trial court is not required to advise the defendant of his right to testify, or obtain an affirmative waiver of the right on the record. (*People v. Enraca* (2012) 53 Cal.4th 735, 762; *People v. Bradford, supra,* 15 Cal.4th at pp. 1332–1333 [where no express conflict is apparent, "the trial court [is] not obligated expressly to advise defendant of his right to testify, or to obtain his personal waiver of that right"]; *People v. Bradford* (1997) 14 Cal.4th 1005, 1052–1053; *People v. Alcala* (1992) 4 Cal.4th 742, 805; *People v. Johnson* (2020) 45 Cal.App.5th 123, 130 [no personal waiver of right to testify required].) A trial judge may safely assume that a defendant, who is represented and who does not testify, is merely

exercising his Fifth Amendment privilege against self-incrimination. (*People v. Alcala*, at p. 805.) " 'When the record fails to disclose a timely and adequate demand to testify, a defendant may not await the outcome of the trial and then seek reversal based on his claim that despite expressing to counsel his desire to testify, he was deprived of that opportunity.' " (*People v. Bradford*, *supra*, 14 Cal.4th at p. 1053.) In *People v. Enraca*, for example, the defendant contended the trial court erred by failing to "advise him of his right to testify or obtain an on-the-record waiver of that right." (*People v. Enraca*, at p. 762.) *Enraca* explained: "The claim fails. [¶] A trial court has no duty to give such advice or seek an explicit waiver, unless a conflict with counsel comes to its attention." (*Ibid.*)

Here, although it was not required to, the trial court informed Gillig that he had the right to testify. Based on the colloquy set forth above, it was clear there was no conflict between counsel and Gillig regarding his exercise of the right; Gillig simply refused to state his preference. The court committed no error, constitutional or otherwise, by failing to attempt to extract a waiver from a defendant who refused to give it, but who also declined to testify. There is no merit to Gillig's contention that the trial court was obliged to obtain a knowing, voluntary, intelligent personal waiver on the record.

Gillig makes a variety of arguments in an attempt to overcome this result, none persuasive. He asserts that he was denied his opportunity to testify and his desire to do so was "thwarted." Not so. He was repeatedly offered the opportunity to testify and declined to accept it. He complains that the trial court "steer[ed] [him] away from the right to testify by denying his earnest request for [information regarding] what his rights

were." The record belies this contention. The trial court expressly advised Gillig that he had the right to testify, or could choose not to do so. In response to his queries, it informed Gillig that he would be subject to the rules of evidence as set forth in the Evidence Code, would be subject to cross-examination, and could not simply say what he wished. It then ordered counsel to confer with Gillig. Counsel confirmed he had responded to Gillig's questions about what testifying entailed, had reiterated the court's comments that "it does involve quite a bit of law related to evidence," and had gone over "the procedure on my questioning and the D.A.'s questioning, what he would be subject to." Thus, the court responded to Gillig's inquiries and did nothing to discourage him from testifying. Short of sending him to law school, it is unclear what else the trial court could have done to respond to his request for more information.

Gillig complains that his query—"I was wondering about the relationship between me and my attorney. What is he by law required to—" amounted to a "clear indication of a conflict between client and counsel," but was curtailed by the court. It was not. The statement itself does not suggest a conflict on the issue of Gillig's testimony. Gillig never stated that counsel had advised him not to testify, but he wished to do so nonetheless. To the contrary, counsel informed the court that Gillig refused to state whether he wished to testify. To adopt Gillig's arguments here would give an obstreperous or crafty defendant the power to hold the court hostage and build reversible error into the record simply by refusing to state his choice to testify or not. Such is not the law.

4. *Cumulative error*

Gillig maintains that the cumulative effect of the purported errors requires reversal, even if they were individually harmless. Because we have found no error, "there is no cumulative prejudice to address." (*People v. Landry* (2016) 2 Cal.5th 52, 101.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

EGERTON, J.

DHANIDINA, J.